83-1962

No.

Supreme Court of the United States

October Term, 1983

AMERICAN KOYO CORPORATION,
Petitioner,

vs.

EDGAR L. LINDLEY,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED FOR REVIEW

Whether goods are "in transit" in interstate commerce (or foreign commerce) and thereby exempt from Ohio personal property taxation under the Commerce (and/or Import-Export) Clause of the United States Constitution where the goods enter Ohio from an out-of-state supplier only after having been pre-sold by an Ohio taxpayer to out-of-state customers, and are temporarily held in Ohio awaiting delivery to out-of-state customers, and while so held are identified as the goods to which the out-of-state customers' contracts refer.

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AMERICAN KOYO CORPORATION,
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EDGAR L. LINDLEY,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Petitioner, American Koyo Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Ohio, Eighth Appellate District, entered in this matter on October 13, 1983. The final orders of the Supreme Court of Ohio dismissing Petitioner's appeal and denying Petitioner's motion for an order directing the Court of Appeals to certify its record to the Supreme Court of Ohio were entered on February 29, 1984. This Petition, therefore, is filed within Ninety Days of the Supreme Court of Ohio's denial of discretionary review.

OPINIONS BELOW

The final orders of the Supreme Court of Ohio are appended hereto on pages A1 and A2 of the Appendix. The journal entry and opinion of the Court of Appeals for the Eighth Appellate District of Ohio is printed in the Appendix at page A3. The journal entry of the Board of Tax Appeals is printed in the Appendix at page A9.

JURISDICTION

The final orders of the Supreme Court of Ohio were entered on February 29, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3 (Commerce Clause) provides in pertinent part as follows:

> The Congress shall have power . . .
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

Article I, Section 10, Clause 2 (Import-Export Clause) provides as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing

its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

STATEMENT OF THE CASE

Appellee, the Tax Commissioner of Ohio, seeks to impose a tax pursuant to R.C. 5701.01, *et seq.*, on goods (roller and ball bearings, referred to herein as "bearings") while they are temporarily held in the Ohio warehouse of an Ohio Taxpayer, Petitioner American Koyo Corporation (referred to herein as "Taxpayer").

Taxpayer is a United States subsidiary wholly owned by a Japanese corporation, Koyo Seiko Co., Ltd. (referred to herein as "Parent").*

Taxpayer is in the business of selling throughout the United States bearings manufactured by its Parent in Japan and imported into the United States. Taxpayer stores bearings at four warehouse locations in the United States, including a warehouse in Westlake, Ohio, but no manufacturing or processing is performed in this country.

84.3% of all bearings imported into the Ohio warehouse are shipped on to out-of-state customers. (Indeed, 58.8% of such bearings are types for which Taxpayer has no Ohio customers so that they are never shipped intrastate within Ohio.) The Commissioner seeks to impose a personal property tax on the 84.3% of Taxpayer's bearings

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*The following listing is included pursuant to Rule 28.1 of the Rules of the Supreme Court:

Taxpayer's Parent: Koyo Seiko Co., Ltd.

Taxpayer's Affiliate: Koyo International Inc. of America.

shipped out-of-state, less 19.9% of the bearings shipped to Taxpayer's own out-of-state warehouses.

Two critical facts in our case are different from the facts found in any other decided case:

> First, Taxpayer pre-sells the bearings before they are ordered from the Parent and imported into Ohio; and
>
> Second, the bearings for each of Taxpayer's customers are separately palletized and shipped by the Parent to Taxpayer in packaging which identifies the Taxpayer's customer by name, identification number, and/or customer's part number. (Indeed, Taxpayer ships the bearings to its customers in their original packaging and pallets without breaking bulk.)

Thus Taxpayer's ordinary business procedure is first to obtain a purchase order from its customer and thereafter to place Taxpayer's purchase order with the Parent (which purchase order identifies Taxpayer's customer). When the Parent accepts Taxpayer's purchase order, Taxpayer provides its acceptance of the customer's purchase order, all of which gives rise to an existing sales contract prior to the bearings being imported into Ohio.

The Parent manufactures the bearings, separately palletizes the bearings for each of Taxpayer's customers, and packages the bearings with markings identifying Taxpayer's customer by name, identification number, and/or customer part number.

When the bearings enter Ohio to be received and held temporarily at Taxpayer's warehouse, they are already obligated to a specific customer by pre-existing contract and are marked as the bearings to which the customer's contract refers.

Taxpayer's procedures are completed when it completes shipment of the bearings ot the out-of-state customer per the pre-existing contract.

These procedures have substantial legal significance under the Uniform Commercial Code, since the pre-existence of a valid sales contract and identification of the bearings as the bearings referred to by the contract confers on Taxpayer's out-of-state customer a "special property interest" in the bearings.*

It is Taxpayer's position on this appeal that its ordinary business procedures should likewise have substantial tax-law significance, since from the time the bearings enter Ohio they are committed to an out-of-state customer, and throughout the time that they are being held in Taxpayer's Ohio warehouse, they are subject to the "special property interest" of the out-of-state customer. As a consequence, the bearings are—both factually and legally—"in transit" through Ohio from Taxpayer's out-of-state supplier in Japan to Taxpayer's out-of-state customer in the United States.

The constitutional question concerning the "in transit" exemption of goods in interstate or import commerce was raised (Notice of Appeal, No. 6) and decided by the Ohio Board of Tax Appeals, was the first of two Assignments of Error decided by the Ohio Court of Appeals, and was the first of two grounds presented to the Ohio Supreme Court in support of the Motion to Certify.

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*See R.C. 1302.45(A)(2) (U.C.C. 2-501):

The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers [as follows] . . .: if the contract is for the sale of future goods . . ., when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers. . . .

REASONS FOR GRANTING THE WRIT

A writ of certiorari is sought for the special and important reason that the facts in this case present an appropriate opportunity for this Court to determine the viability, if any, of the "in transit" exemption of interstate and import commerce from State taxation.

In *Michelin Tire Corp. v. Wages* (1976), 423 U.S. 276, this Court upheld State taxation of import commerce based on the circumstances of that case, but appeared to recognize that the Commerce and Import-Export clauses of the U. S. Constitution "prohibit the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed." 423 U.S. at 290 n.11.

The issue which a case such as ours raises is whether goods remain "in transit" while in the warehouse, or whether the goods "come to rest" in warehouse storage so as no longer to be "in transit."

Controlling constitutional law prior to the 1976 decision of *Michelin Tire Corp. v. Wages, supra,* was clear to the effect that Taxpayer's bearings would not have been subject to state taxation while in Taxpayer's Ohio warehouse in 1976 and prior years.

> *See Low v. Austin* (1872), 13 Wall. 29, 20 L. Ed. 517 (overruled by *Michelin Tire Corp. v. Wages, supra*).

Indeed, the assessment sought by the Commissioner in this case for the year 1977 is the first effort to tax bearings held for out-of-state shipment in Taxpayer's Ohio warehouse.

The United States Supreme Court's decision in *Michelin Tire Corp. v. Wages, supra,* was followed by the Ohio Supreme Court's decision on the same facts in:

> *Michelin Tire Corp. v. Lindley* (1978), 540 Ohio St. 2d 313.

Nevertheless, it cannot be said that on the facts of our case the controlling constitutional principles are clear or even that the appropriate constitutional considerations are apparent. For example, the Commissioner issued a Bulletin in response to the United States Supreme Court's *Michelin* decision stating that personal property is taxable only if no longer "in transit" in interstate or foreign commerce, yet no interpretation or definition of "in transit" has ever been provided by the Commissioner or any Ohio court, including the appeals court below. Indeed, the decision below conflicts with at least one other determination of the "in transit" issue by a sister state's appellate court.

> *See Indiana State Bd. of Tax Com'rs. v. Stanadyne, Inc.* (Ind. App. 1982), 435 N.E.2d 278, 282.

Moreover, the appeals court below cited only the *Michelin* case as supporting its decision that Taxpayer's bearings were no longer "in transit", yet the facts in *Michelin* differ from our case in at least four critical respects:

1. Michelin imported tires into Georgia and held them there while they were offered for future sale to customers which were located within Georgia as well as out-of-state. In contrast, 84.3% of Taxpayer's bearings are pre-sold prior to being imported into Ohio and are warehoused here only

as a "break-in transit" from out-of-state supplier to out-of-state customer.

2. When Michelin's tires entered Georgia, their sole destination was Michelin's place of business. In contrast, 84.3% of Taxpayer's bearings enter Ohio with an out-of-state customer as the ultimate destination.

3. While in Georgia, Michelin's tires were not committed in any way to an out-of-state customer unless and until such time as they were sold to a customer located out of state, and until such time they were subject to sale to a customer within Georgia. In contrast, 84.3% of Taxpayer's bearings are committed to an out-of-state customer throughout the time they are in Ohio and are at all times even subject to the out-of-state customer's "special property interest."

4. Michelin's tires shipped out-of-state were shipped pursuant to a sale made while the goods were in Georgia, and interstate transit of the tires was resumed only if an out-of-state sale is made rather than a sale to a Georgia customer. In contrast, Taxpayer's bearings are pre-sold before entering Ohio and the interstate transit of 84.3% of them is not dependent on any sales transaction occurring while they are being held in an Ohio warehouse.

At the very least, it can be said that the *Michelin* cases are not compelling authority in our case and that good grounds exist for distinguishing it as was done in *Indiana State Bd. of Tax Com'rs. v. Stanadyne, Inc.* (Ind. App.), 435 N.E.2d 278.

CONCLUSION

Our appeal presents for decision a substantial issue in an unsettled area of constitutional law which has not been addressed, much less foreclosed, by any decision of the United States Supreme Court, and which was decided by the state appeals court below based on the citation of distinguishable authority and with a lack of comprehensive reasoning.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated February 29, 1984)

No. 83-1940

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

AMERICAN KOYO CORP.,
Appellant,

vs.

EDGAR L. LINDLEY, TAX COMMR.,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR REHEARING

(Dated February 29, 1984)

No. 83-1940

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

AMERICAN KOYO CORP.,
Appellant,

vs.

EDGAR L. LINDLEY, TAX COMMR.,
Appellee.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Decided October 13, 1983)

No. 46444

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

AMERICAN KOYO CORPORATION,
Plaintiff-Appellant,

VS

EDGAR L. LINDLEY,
Defendant-Appellee.

CIVIL APPEAL FROM THE BOARD OF TAX APPEALS, CASE NO. 80-E-452
AFFIRMED

JOURNAL ENTRY AND OPINION

STILLMAN, *P.J.*:

The appellant, American Koyo Corporation, is appealing from a decision of the Board of Tax Appeals of the State of Ohio sustaining the assessment of personal property taxes for the return year of 1977.

Two assignments of error are presented by the appellant.

> "A. ALL BEARINGS RECEIVED FOR TEMPORARY STORAGE IN OHIO BY TAXPAYER, PENDING DELIVERY OUT OF STATE, ARE 'IN TRANSIT' TO SPECIFIC CUSTOMERS AND ARE ACCORDINGLY EXEMPT FROM TAXATION UNDER THE IMPORT-EXPORT AND COMMERCE CLAUSES OF THE U.S. CONSTITUTION AND THE CORRESPONDING 'IN TRANSIT' EXEMPTION RECOGNIZED BY THE COMMISSIONER.
>
> "B. TAXPAYER'S BEARINGS TEMPORARILY STORED IN OHIO PENDING DELIVERY OUT-OF-STATE PURSUANT TO PRE-EXISTING ORDERS ARE NOT 'USED IN BUSINESS' IN OHIO, AS IS REQUIRED BY SECTION 5709.01 O.R.C. FOR PROPERTY TO BE TAXABLE."

The taxpayer is an Ohio corporation, wholly owned by Koyo, Seiko Co., Ltd., a Japanese corporation. Its business consists of selling and delivering industrial bearings manufactured by the Japanese parent company to customers throughout the United States. While awaiting delivery these bearings are held in warehouses operated by the taxpayer in Westlake, Ohio; St. Louis, Missouri; Seattle, Washington; and Compton, California.

All of the bearings held in Westlake are ordered for delivery to a predetermined customer and are sent to the taxpayer through the port of Baltimore, Maryland, for transshipment to Westlake, Ohio. These deliveries are made in unbroken, pallet-sized containers but are occasionally sent on from the warehouse in installments to accommodate the customer's needs. Accordingly, some bearings were [2] stored for several months. 15.7% of this

merchandise was sent on to Ohio customers during the tax year here at issue and 84.3% was delivered outside of Ohio. The Tax Commissioner refused to exempt the latter items from taxation and the Board of Tax Appeals agreed.

Assignment of Error A:

> "ALL BEARINGS RECEIVED FOR TEMPORARY STORAGE IN OHIO BY TAXPAYER, PENDING DELIVERY OUT OF STATE, ARE 'IN TRANSIT' TO SPECIFIC CUSTOMERS AND ARE ACCORDINGLY EXEMPT FROM TAXATION UNDER THE IMPORT-EXPORT AND COMMERCE CLAUSES OF THE U.S. CONSTITUTION AND THE CORRESPONDING 'IN TRANSIT' EXEMPTION RECOGNIZED BY THE COMMISSIONERS."

This assignment of error asserts that the Constitution of the United States has been violated by the action of the Tax Commissioner because the assessed property was "in transit" in interstate commerce and therefore exempt from taxation under Article I, Sections 8 and 10 of the Federal Constitution.

Both the appellant and the appellee cite *Michelin Tire Co. v. Wages* (1976), 423 U.S. 276, 96 S.Ct. 535, as authority for their conflicting views. In *Michelin,* the Court considered a distribution warehouse maintained by the taxpayer which delivered tires to its franchises upon order. The Court held that "a state's assessment of a nondiscriminatory *ad valorem* property tax against imported goods included in the importer's inventory at its wholesale distribution warehouse in the state and no longer in import transit does not violate the prohibition of the import-export clause of the Federal Constitution (Art. I, Sec. 10, Cl. 2) against state imports or duties on imports, *regardless* of whether the goods have lost their status as

imports by being mingled with other goods of the importer." (Emphasis added.)

[3] The Supreme Court noted also that "there is no reason why local taxpayers should subsidize the services used by the importers; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods." *Michelin, supra* at 289.

In this context it should be noted that the Assistant Secretary in Administrative Management of the Taxpayer testified before the Board of Tax Appeals that the bearings in question were "purchased from Koyo or related companies around the world" for "sale here in the United States." (Board of Tax Appeals Transcript p. 13.)

We find, therefore, that the property at issue is not "in transit" within the meaning of the Constitution and overrule the first assignment of error.

Assignment of Error B:

> "TAXPAYER'S BEARINGS TEMPORARILY STORED IN OHIO PENDING DELIVERY OUT-OF-STATE PURSUANT TO PRE-EXISTING ORDERS ARE NOT 'USED IN BUSINESS' IN OHIO, AS IS REQUIRED BY SECTION 5709.01 O.R.C. FOR PROPERTY TO BE TAXABLE."

This assignment of error challenges the application of R.C. 5701.08 to the property of the taxpayer.

> "As used in Title LVII [57] of the Revised Code:
>
> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carry-

ing on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or [4] not, or when stored or kept on hand as material, parts, products, or merchandise. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be 'used' by the owner of such plant or other facility within the meaning of 'used in business' until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government, and merchandise or agricultural products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside of this state are not used in business in this state. Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

"(B) 'Business' includes all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations."

The thesis advocated by the appellant that the bearings imported from Japan are in storage only and not used in business is not in harmony with *Joslyn Mfg. Co. v. Bowers* (1960), 170 Ohio St. 575.

The Ohio Supreme Court held in *Joslyn* that "Personal property held in Ohio pending shipment directly to customers is not held 'for storage only' within the meaning of Section 5701.08 Revised Code, and is subject to taxation as property used in business in Ohio regardless of whether such shipment upon order by customers is to points inside or outside Ohio."

[5] More recently, in *Michelin Tire Corporation v. Lindley* (1978), 54 Ohio St. 2d 313, the Ohio Supreme Court reached an identical conclusion in following *Michelin Tire Corp. v. Wages, supra.*

We, therefore overrule the second assignment of error and affirm the decision of the Board of Tax Appeals.

[6] It is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Board of Tax Appeals Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAHLING,* P.J.,

GREY,* J., concur.

/s/ SAUL G. STILLMAN*
Judge

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*SITTING BY ASSIGNMENT:

Judge Saul G. Stillman, Retired, of the Eighth Appellate District; Judge Alfred E. Dahling, of the Eleventh Appellate District; and Judge Lawrence Grey of the Fourth Appellate District.

DECISION AND ORDER OF THE BOARD OF TAX APPEALS

(Dated January 6, 1983)

Case No. 80-E-452

BOARD OF TAX APPEALS
STATE OF OHIO

AMERICAN KOYO CORPORATION,
Appellant,

vs.

EDGAR L. LINDLEY,
Tax Commissioner of Ohio,
Appellee.

DECISION AND ORDER

(Personal Property Tax)

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal [2] filed herein under date of November 5, 1980, by the appellant above named. This appeal is from a final assessment certificate of valuation of the Tax Commissioner dated October 9, 1980, wherein said official assessed additional personal property for return year 1977.

The appellant's notice of appeal reads, in pertinent part, as follows:

> "3. Appellant contends that said Assessment of the Tax Commissioner is erroneous, unreasonable and unlawful, both in law and in fact, in the following respects:

"4. The Tax Commissioner erred in the assessment of tangible personal property not previously assessed in that the assessed property is not used in business in Ohio but is held for storage only in Ohio and is exempt from personal property tax under Section 5701.08 of the Ohio Revised Code and Rule 5703-3-21. The assessed property is imported from outside of Ohio and is shipped to points outside of Ohio.

"5. The Tax Commissioner erred in the assessment of tangible personal property not previously assessed in that the Appellant's shipments of such tangible personal property are in transit in interstate commerce and therefore exempt under the Tax Commissioner's Bulletin No. 244.

"6. The Tax Commissioner erred in applying to the facts of this case a rule of analysis with regard to the 'in transit' doctrine which violates the Constitution of the United States, specifically those clauses pertaining to Commerce, to Imports, and to the right to Due Process.

[3] "7. The Tax Commissioner erred in applying to the facts of this case a rule of analysis with regard to the 'in transit' doctrine which was adopted in violation of the taxpayer's right to Due Process as guaranteed under the Constitution of the United States, and which was adopted in violation of the rules of administrative procedure set forth at Section 119.01 *et. seq.* of the Ohio Revised Code.

"8. The Tax Commissioner erred by his disallowance of the percentage method for determining 'in transit' status which was used by the Appellant when the same method is approved for determining 'held

for storage only' status under Rule 5703-3-21, thus violating the Equal Protection Clause of the Constitution of the United States.

"9. The Tax Commissioner, as an agent and officer of the State of Ohio, is estopped from collecting the taxes assessed against the Appellant because representations previously made to the Appellant by agents and officers of the State of Ohio induced reasonable reliance on the part of the Appellant to the Appellant's detriment.

"WHEREFORE, Appellant prays that the Tax Commissioner, pursuant to Section 5717.02, Ohio Revised Code, certify to the Board of Tax Appeals a transcript of the proceedings before him together with all evidence considered by him in connection therewith; that the Board of Tax Appeals hear Appellant's evidence establishing its objections to the assessment; that any penalty be remitted in full; and that the Appellant be afforded any and all other relief from the aforesaid Assessment of the Tax Commissioner to which Appellant may be entitled."

[4] The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified by the Tax Commissioner, the testimony and other evidence received at a record hearing, and the briefs supplied by counsel for the parties.

The appellant, American Koyo Corporation, is an Ohio corporation which is a subsidiary of Koyo Seiko Co., Ltd., a Japanese corporation. The appellant purchases industrial bearings from Koyo Seiko and imports them to the United States. The appellant has warehouses in Saint Louis, Missouri, Seattle, Washington, Compton, California and

Westlake, Ohio. No manufacturing or processing is performed by the appellant in Ohio.

The appellant sells industrial bearings to original equipment manufacturers located throughout the United States. Only after the appellant receives an order from a customer is an order placed upon the factory in Japan. Generally, the customers order a years supply of a particular bearing. Equal monthly deliveries are anticipated. However, the customer's actual production schedule usually requires a different delivery schedule than initially anticipated. For [5] example, the appellant received a purchase order from International Harvester for 10,000 bearings. About that time, the parties agreed that 833 bearings would be delivered each month beginning in January. However, the amount actually delivered each month was substantially different. In fact, the delivery requirements changed many times during the year (Ex. 5). Thus, the bearings are held in storage at the appellant's warehouse pending delivery to a specific customer according to that customers production schedule.

The appellant places the orders with Koyo Seiko, the manufacturer, twice a year, even though its customers usually order a years supply. At the factory, the bearings are packed in cartons which indicate the purchase order number. The carton may also be marked with the customer's part number. These cartons are then banded and palletized. The bearings are imported through the port of Baltimore and arrive at the warehouse for distribution to the customer.

The Tax Commissioner determined that only 19.9% of the bearings stored in Ohio were not subject to the personal property tax, since these bearings were shipped to the appellant's warehouses located in other [6] states. The

appellant claims that 84.3% of the bearings are not subject to the Ohio personal property tax because these bearings are shipped to customers located outside of Ohio. In other words, the appellant is claiming that most of the bearings received at its Westlake warehouse are held for storage only and are still "in transit" to a particular customer.

R. C. 5709.01 provides, in pertinent part, that:

> "*All personal property located and used in business in this state,* and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, *are subject to taxation, regardless of the residence of the owners thereof.*" (Emphasis Added)

R. C. 5701.03 defines "personal property" as follows:

> "As used in Title LVII [57] of the Revised Code, 'personal property' includes every tangible thing which is the subject of ownership, whether animate or inanimate, other than patterns, jigs, dies, or drawings, which are held for use and not for sale in the ordinary course of business, money, and motor vehicles registered by the owner thereof, [7] and not forming part of a parcel of real property, as defined in section 5701.02 of the Revised Code; also every share, portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, used or designed to be used in business either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere."

The term "used in business" is defined for purposes of taxation in R. C. 5701.08:

> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hold as material, parts, products, or merchandise. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be 'used' by the owner of such plant or other facility within the meaning of 'used in business' until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government, and *merchandise* or agricultural [8] products *shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside of this state are not used in business in this state.* Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere." (Emphasis Added)

The Tax Commissioner has duly promulgated a rule to determine whether personal property has a tangible situs in Ohio. O.A.C. 5703-3-21 reads:

"Personal property belonging to either a resident or nonresident of this State, will not be considered as being 'used in business' in this State, within the meaning of said phrase as defined in Revised Code 5701.08 only if all of the following conditions exist:

"(A) The property involved is either 'agricultural products' or 'merchandise.'

" 'Merchandise' includes all items of property in saleable form

"(B) The property involved is shipped into Ohio from points outside this State

"(C) The property involved is held in Ohio in a 'warehouse or a place of storage'

"(D) The property involved, while in storage in Ohio, is held for 'storage only' and for 'shipment outside of this State'

[9] "Property will be considered as being so held if:

"(1) It is to be shipped, without processing, to the taxpayer or persons other than 'customers' at locations outside this State for use, processing, or sale, or,

"(2) It is located in public or private warehousing facilities which are not subject to the control of or under the supervision of the taxpayer or manned by its employees from which it is to be shipped to persons outside the State of Ohio

" 'Customers' as used herein includes all persons with whom a taxpayer normally and usually deals

as a matter of established business practice or policy. The term, however, does not include consignees or bailees

"The provisions of Revised Code 5701.08 relating to merchandise or agricultural products in storage shall not have application to any items of personal property which are shipped into this State for purposes of manufacturing or further processing herein. Natural aging and preventive measures taken to insure the preservation of property items while in storage are not considered as steps in the manufacturing or processing of the property."

In *Michelin Tire Corp. v. Wages*, 424 U.S. 935 (1976), the United States Supreme Court held that a nondiscriminatory property tax could be validly applied to imports. The Court stated:

"Petitioner's tires in this case were no longer in transit. They were stored in a distribution warehouse from which petitioner conducted a wholesale operation, taking orders from franchised dealers and filling them from a **[10]** constantly replenished inventory. The warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, and we therefore hold that the nondiscriminatory property tax levied on petitioner's inventory of imported tires was not interdicted by the Import-Export clause of the Constitution."

The appellant claims that the bearings were still in transit, since the bearings were earmarked for a specific customer located outside Ohio. Thus, it is contended that this merchandise was not being held in storage for customers located within as well as outside Ohio. This Board

disagrees. The bearings were no longer in transit. The bearings were purchased from Koyo Seiko and then sold to customers in the United States. The appellant did not ship an entire order as received from the factory, even though the appellant claims that it only sold bearings in pallet size quantities.* The bearings remained in the appellant's warehouse until needed to meet the customers varying delivery schedules. This storage was a necessary part of the appellant's business **[11]** activity. Thus, the bearings were subject to Ohio's nondiscriminatory personal property tax. It should also be noted that the palletized bearings cannot be considered as instrumentalities of foreign or interstate commerce. See *Japan Line, Ltd., v. County of Los Angeles*, 441 U.S. 434 (1979).

The appellant also claims that the bearings were not "used in business" as that term is defined in R. C. 5701.08. The Ohio Supreme Court has interpreted R. C. 5701.08 in *Joslyn Mfg. & Supply Co. v. Bowers* 170 Ohio 575 (1960). The syllabus reads:

> "Personal property held in Ohio pending shipment directly to customers is not held 'for storage only' within the meaning of Section 5701.08, Revised Code, and is subject to taxation as property used in business in Ohio regardless of whether such shipment upon order by customers is to points inside or outside Ohio."

In *Torrington Co., Inc. v. Bowers* 173 Ohio St. 86 (1962), the Supreme Court held that merchandise stored at a distribution point for sale and shipment to customers was personal property used in business. The appellant attempts to factually distinguish these cases by saying that the bearings were not held in inventory **[12]** pending cus-

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*It seems inconceivable that the quantity required by the customer would always equal the quantity palletized by the factory in Japan.

tomer orders. This Board is not satisfied that the appellant's operation is substantially different. The Westlake warehouse is a distribution point. The storage of the bearings until needed by the customer is a vital part of the appellant's operation. The Board finds that the bearings were returnable as personal property used in business.

Giving effect to the findings of the Board of Tax Appeals, the statutes, and the applicable case law, it is the order of the Board of Tax Appeals that the final assessment certificate of valuation should be and hereby is affirmed. It is further ordered that a certified copy of this decision and order be certified to the Auditor of Cuyahoga County.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/s/ Robert E. Boyd, Jr.
Chairman

ASJ/prm

OHIO REVISED CODE 5701.08

5701.08 Used in business and business defined [Effective 12-2-67]

As used in Title LVII of the Revised Code:

(A) Personal property is "used" within the meaning of "used in business" when employed or "utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products,

or merchandise. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be "used" by the owner of such plant or other facility within the meaning of "used in business" until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government, and merchandise or agricultural products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside of this state are not used in business in this state. Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are "used" when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

(B) "Business" includes all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations.

HISTORY: 132 v H 480, eff. 12-2-67
126 v 78; 1953 H 1; GC 5325-1

5701.08 Used in business and business defined [Effective 7-1-83]

As used in Title LVII of the Revised Code:

(A) Personal property is "used" within the meaning of "used in business" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when

kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be "used" by the owner of such plant or other facility within the meaning of "used in business" until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government, and merchandise or agricultural products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside of this state are not used in business in this state. Leased property used by the lessee exclusively for agricultural purposes and new or used machinery and equipment and accessories therefor that are designed and built for agricultural use and owned by a merchant as defined in section 5711.15 of the Revised Code are not considered to be "used" within the meaning of "used in business." Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are "used" when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

(B) "Business" includes all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations.

HISTORY: 1983 H 291, eff. 7-1-83
132 v H 480; 126 v 78; 1953 H 1; GC 5325-1

OHIO REVISED CODE 5709.01

TAXABLE PROPERTY

5709.01 Taxable property entered on general tax list and duplicate [Effective 12-2-67]

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

HISTORY: 132 v H 480, eff. 12-2-67
126 v 166; 1953 H 1; GC 5328

TAXABLE PROPERTY

5709.01 Taxable property entered on general tax list and duplicate; exemptions [Effective 7-1-83]

(A) All real property in this state is subject to taxation, except only such as is expressly exempted therefrom.

(B) Except as provided by division (C) of this section or otherwise expressly exempted from taxation:

(1) All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture are subject to taxation, regardless of the residence of the owners thereof.

(2) All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21 of the Revised Code, are subject to taxation.

(C) The following property of the kinds mentioned in division (B) of this section shall be exempt from taxation;

(1) Unmanufactured tobacco to the extent of the value, or amounts, of any unpaid nonrecourse loans thereon granted by the United States government or any agency thereof.

(2) All other such property in the aggregate taxable value thereof required to be listed by the taxpayer under Chapter 5711. of the Revised Code does not exceed tn thousand dollars. If the taxable value of such property exceeds ten thousand dollars:

(a) Only such property having an aggregate taxable value of ten thousand dollars shall be exempt.

(b) If such property is located in more than one taxing district as defined in section 5711.01 of the Revised Code, the exemption of ten thousand dollars shall be applied as follows:

(i) The taxable value of such property in the district having the greatest amount of such value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(ii) If the exemption has not been fully utilized under division (C)(2)(b)(i) of this section, the value in the district having the second greatest value shall be reduced until the exemption has been f ˙ly utilized or the value has been reduced to zero, whichever occurs first;

(iii) If the exemption has not been fully utilized under division (C)(2)(b)(ii) of this section, further reductions shall be made, in repeated steps which include property in districts having declining values, until the exemption has been fully utilized.

(D) All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

HISTORY: 1983 H 291, eff. 7-1-83
132 v H 480; 126 v 166; 1953 H 1; GC 5328

CASE NO. 83–1962

In The Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN KOYO CORPORATION
Petitioner,

v.

EDGAR L. LINDLEY,
Tax Commissioner of Ohio,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

WHETHER GOODS HELD BY THE PETITIONER IN ITS OHIO WAREHOUSE WERE "IN TRANSIT" IN INTERSTATE COMMERCE (OR FOREIGN COMMERCE) AND THEREBY EXEMPT FROM OHIO PERSONAL PROPERTY TAXATION UNDER THE COMMERCE (AND/OR IMPORT-EXPORT) CLAUSE OF THE UNITED STATES CONSTITUTION, WHEN THE GOODS WERE PURCHASED AND IMPORTED BY THE PETITIONER FROM OUTSIDE THE COUNTRY FOR SALE TO CUSTOMERS IN THE UNITED STATES, AND WERE STORED IN THE OHIO WAREHOUSE, PENDING DELIVERY TO OUT-OF-STATE CUSTOMERS.

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STATEMENT OF THE CASE

This case originated in the Ohio Board of Tax Appeals as the result of an appeal by American Koyo Corporation (Petitioner) from a final assessment certificate of valuation issued by the Tax Commissioner for its 1977 personal property tax return year. The certificate had increased the total final assessed value of the Petitioner's property from that previously reported. The increase resulted from the Tax Commissioner's determination that the Petitioner had failed to return property which

was used in business in Ohio and was, therefore, subject to personal property tax. The appeal disputed this finding.

An evidentiary hearing was held and briefs were filed by the parties. The record revealed that American Koyo Corporation is an Ohio corporation, which is a wholly-owned subsidiary of Koyo Seiko Co., Ltd., a Japanese corporation. The parent company manufactures bearings, and the Petitioner is in the business of importing these bearings to the United States for sale. The Petitioner has an office and warehouse in Westlake, Ohio, where it receives imported bearings that have arrived in this country at the port of Baltimore. The Petitioner stores the bearings in its Ohio warehouse pending shipment to its other warehouses or delivery, as needed, directly to its customers.

The Petitioner normally sends purchase orders to its parent company's factory twice a year. The amount purchased reflects American Koyo's anticipated needs for the upcoming year based on orders received from its customers. The purchase orders to the factory usually indicate the Petitioner's intended customer, and the factory in packing the bearings indicates the Petitioner's purchase order number.

The Petitioner's purchase order directs the factory to ship bearings to it at its Cleveland (Westlake) warehouse. Because the Petitioner normally receives shipments only two or three times a year, but may make deliveries to its customers on a monthly basis, it often makes advance orders of enough to meet future deliveries. As a result, it sometimes stores bearings, which have been received, for several months, pending delivery to its

customers. In the event that one of the Petitioner's customers cancels an order, the bearings which had been purchased in anticipation of such sale would be sold to another customer.

The Petitioner sells bearings to its customers in pallet-size quantities. That is, depending on the size of the bearing sold, a certain number of bearings can be packed in cartons and bound on pallets. The Petitioner in effect then sells bearings by the pallet.

The Board of Tax Appeals determined that the bearings received for storage at the Westlake warehouse, pending sale and delivery to the Petitioner's customers, were no longer in transit but had come to rest in Ohio so as to be subject to Ohio's personal property tax. On appeal, the Cuyahoga County Court of Appeals, citing testimony in the record that the bearings were purchased from the parent company in Japan for "sale here in the United States," agreed with the Board that such bearings were no longer in transit, but were being held in Ohio for use in the Petitioner's business. It, therefore, affirmed the Board's decision.

The Petitioner subsequently filed a notice of appeal and motion to certify the case to the Ohio Supreme Court; however, on February 29, 1984, that Court overruled the motion. On May 29, 1984, the Petitioner filed with the United States Supreme Court a Petition for Writ of Certiorari to the Supreme Court of Ohio.

ARGUMENT

I. IMPORTED PROPERTY WHICH IS RECEIVED AND HELD BY THE PETITIONER IN ITS OHIO WAREHOUSE PENDING SUBSEQUENT SALE AND DELIVERY TO OUT-OF-STATE CUSTOMERS IS NO LONGER "IN TRANSIT", BUT HAS COME TO REST IN OHIO AND IS SUBJECT TO THE OHIO PERSONAL PROPERTY TAX.

The Petitioner has argued that this case presents a previously unconsidered situation, in which "pre-sold" imported property is merely in transit through a state. The Petitioner argues that the imposition of an *ad valorem* tax on such property is prohibited by Article I, Section 8, Clause 3 (Commerce Clause) and Article I, Section 10, Clause 2 (Import-Export Clause) of the United States Constitution. It is the position of the Respondent Tax Commissioner that this argument is without basis in either fact or law.

Specifically, the "in transit" concept relied on by the Petitioner is derived from the United States Supreme Court's decision in *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 495 (1976). In that case the Supreme Court considered whether an *ad valorem* property tax on tires held by that taxpayer at its wholesale distribution warehouse was prohibited by either the Commerce Clause or the Import-Export Clause. The Court noted that the purpose of the Commerce Clause was to preserve the federal government's power to regulate the flow of interstate commerce. With respect to the Import-Export Clause the Court noted that its purpose

was threefold, (1) to preserve the federal government's right to speak with one voice when regulating commercial relations with foreign nations, (2) to preserve import revenues as a major source of revenue for the federal government, and (3) to prevent seaboard states with ports of entry from levying taxes on citizens of other states by taxing goods that merely flow through the ports to other states.

With respect to Georgia's *ad valorem* property tax the Court found no conflict with these principles. In doing so it noted at p. 286 that the tax was a nondiscriminatory tax imposed on all goods that are no longer "in import transit." At p. 287 the Court reasoned:

> "Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies."

The Court also concluded that the tax did not interfere with the free flow of imported goods among the States. Noting that the petitioner's warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, the Court held that the property was not merely in transit and that there was no discrimination against the taxpayer based on the property's place of origin.

Subsequently in *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies et al.,* 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978), the Court reaffirmed the threefold purpose of the Import-Export Clause. The Court also made it clear that the *Michelin* decision constituted a departure from the "original package" rule.[1]

It is, therefore, significant that the instant case is analogous to *Michelin Tire Corp. v. Wages, supra.* Specifically, the Petitioner purchases goods outside the United States and sells them in this country, storing them in the interim in its Ohio warehouse. As such, the assessment of an *ad valorem* tax on the property based on the Petitioner's use of the property in business in Ohio under Ohio law does not interfere with the purposes of the Import-Export Clause as outlined in the *Michelin* decision. Simply put, this is a nondiscriminatory tax applied to domestically manufactured property, as well as to imported property, based on use in this State. It in no

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[1]The fact that the bearings in issue may remain packed in the pallet-sized quantities in which they are eventually sold and delivered is, therefore, in no way determinative as to the right to an exemption under the Import-Export Clause.

way interferes with the federal government's authority to regulate and assess imports; nor does it place Ohio at an advantage over other states as a port state assessing property which merely flows through it to other states.[2]

As for the Petitioner's claim that the assessed property is "pre-sold" to out-of-state customers and, therefore, simply in transit through Ohio, the Respondent would make two points. First, the Petitioner would have this Court assume facts that the lower tribunals did not accept. The Petitioner suggests that its customers had already purchased the bearings prior to their manufacture by the Petitioner's parent company in Japan so as to have some special property interest distinguishing the case from *Michelin Tire Corp. v. Wages, supra.* Both the Board of Tax Appeals and the Court of Appeals declined to make such a finding. On the contrary, the Board expressly disagreed with the Petitioner and found that the bearings were purchased by the Petitioner from its parent company "and then sold to customers in the United States." The Court of Appeals made a similar finding. The factual basis of the Petitioner's argument has, therefore, never been established, and there is no reason for this Court to assume such facts.

Moreover, even if there were a "pre-sale" of the bearings, it would not necessarily follow that the property remained "in transit" indefinitely pending delivery to the Petitioner's customers. This Court has long recognized a break in inter-state commerce when property is brought into a state and stored there pending delivery to an out-of-state customer pursuant to an advance sale of such

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[2] Indeed, the property in this case entered the country through the port of Baltimore.

property. Compare *General Oil Co. v. Crain,* 209 U.S. 211, 28 S. Ct. 475, 52 L. Ed. 754 (1908), in which the Court held that oil brought into Tennessee for temporary storage in a tank pending distribution to fill orders for oil already sold in other states was not exempt from taxation. This Court observed that the break in movement was more than a mere delay or accommodation to the means of transportation; it was for business purposes which require giving the property a locality in the state beyond a mere halting of transportation.

This is the same principle as was relied on by this Court in *Michelin Tire Corp. v. Wages, supra,* when it determined the tires which had arrived at that company's distribution warehouse were no longer "in import transit." So it is here. The Petitioner's bearings are stored in its Ohio warehouse for up to six months pending delivery to its customers. As such, the importation of the bearings had clearly ended and a local business use of the property has commenced.

Finally, with respect to the Petitioner's reliance on the Indiana case of *Indiana State Board of Tax Comm'rs. v. Stanadyne, Inc.,* 435 N.E. 2d 278 (1982) as evidence of uncertainty in the law, it should be noted that the decision in that case cited and relied heavily on the language of the Indiana statute which used an "original package" test for exemption. In addition, the decision did not even mention *Michelin Tire Corp. v. Wages, supra,* much less distinguish it. The Petitioner's reliance on it is, therefore, misplaced.

CONCLUSION

As discussed in the foregoing brief the Petitioner has failed to raise any constitutional issues which have not already been addressed by this Court. Given the Ohio Court of Appeals' determination of facts, there is no constitutional bar to the assessment of an *ad valorem* property tax on bearings held by the Petitioner in its [illegible] warehouse, pending sale and delivery to its customers.

The Petition for Writ of Certiorari is, therefore, without basis and should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Ohio was sent this _____ day of June, 1984 postage prepaid to Herbert Bruce Griswold, Calfee, Halter & Griswold, 1800 Central National Bank Building, Cleveland, Ohio 44114, Counsel for Petitioner. I further certify that all parties required to be served have been served.

JAMES C. SAUER
Assistant Attorney General
Counsel of Record